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Supreme Court, U.S.
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No. ———— 05-424 SEP 12 2005

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In The
Supreme Court of the United States

RAJIB K. MITRA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether broadcasting radio signals that interfere with police radio communications is properly subject to prosecution under 18 U.S.C. § 1030, which is titled "Fraud and related activity in connection with computers." The statute had previously been invoked solely to prosecute computer hacking. In reaching its decision, the Seventh Circuit Court of Appeals held that legislative intent is not relevant where the statutory language may be broadly read to permit criminal prosecution in novel factual scenarios.

2. Whether the Seventh Circuit's procedure of employing a limited remand to district courts for the purpose of having the district court decide, without a re-sentencing hearing, whether the district court would have imposed a different sentence had it known the guidelines were not mandatory, is authorized by rule or by precedent, and whether the procedure comports with this court's decision in *Booker, infra*.

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OPINION BELOW

The Seventh Circuit Court of Appeals opinion is published. See, *United States v. Mitra*, 405 F.3d 492, No. 04-2328, 2005 WL 1390278 (7th Cir. 2005). The District Court's *advisory order on limited remand*, pursuant to *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), is not published, but is available online as 2005 U.S. Dist. LEXIS 9729, affirmed by *United States v. Mitra*, 134 Fed. Appx. 963, 2005 U.S. App. LEXIS 11161 (7th Cir. Wis., June 13, 2005). All three opinions are included in the Appendix.

JURISDICTION

The Seventh Circuit filed its opinion on April 12, 2005, and issued its order affirming the district court, pursuant to the Seventh Circuit Court of Appeals *Paladino* procedure, on June 13, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1030

(a) whoever –

(5)

(A)

- (i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

- (ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
- (iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and

(B) by conduct described in clause (I), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused) –

- (I) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value;
- (ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;
- (iii) physical injury to any person;
- (iv) a threat to public health or safety; or
- (v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;

shall be punished as provided in subsection © of this section.

- (e) As used in this section –

- (1) the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and

includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

- (2) the term "protected computer" means a computer –
 - (A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or
 - (B) which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.

STATEMENT OF FACTS

The Petitioner, Rajib K. Mitra, was indicted in the United States District Court for the Western District of Wisconsin on two counts of violating 18 U.S.C. § 1030(a)(5)(A) and (B), the computer fraud statute, for broadcasting signals that interfered with the Madison, Wisconsin public safety (police) radio communications system.

As can be gleaned from the appendix documents, Mitra, a graduate student at the University of Wisconsin, transmitted a radio signal that prevented the communications system for police, fire, ambulance, and other emergency communications in Madison, Wisconsin, from operating. He was prosecuted for violation of Section 1030, which is titled "Fraud and related activity in connection with computers." It is generally known as the criminal ban on computer hacking.

Mitra argued unsuccessfully in the District Court, and before the Court of Appeals, that his actions were in the nature of unauthorized broadcasts, or interference, and that Section 1030 is intended only to cover those who hack into computer servers to steal or alter information.

The Court of Appeals opinion demonstrates that, as computer chips become more ubiquitous in products ranging from police communications equipment, to cell phones and iPods, to automobiles, the scope of malicious conduct that district courts will permit to be prosecuted under Section 1030 will continue to grow.

The public safety radio frequency communications system in Madison, Wisconsin uses Motorola's Smartnet II. This spreads transmissions across 20 frequencies. Computer hardware and software assigns each conversation to an open channel, with one channel designated for control.

The Court of Appeals wrote that a signal transmitted by Mitra "blanketed all of the City's communications towers and prevented the computer from receiving, on the control channel, data essential to parcel traffic among the other 19 channels." As a result, "public safety departments

were unable to coordinate their activities because the radio system was down."

The Court explained that Mitra would "send the signals that took control of the system." Law enforcement authorities found him by using radio direction finders. They also seized Mitra's computer and radio transmission equipment.

The Court of Appeals wrote that prosecutor's theory, which the District Court accepted, "is that Smartnet II is a "computer" because it contains a chip that performs high-speed processing in response to signals received on the control channel, and as a whole is a "communications facility directly related to or operating in conjunction" with that computer chip. It is a "protected computer" because it is used in "interstate . . . communication"; the frequencies it uses have been allocated by the Federal Communications Commission for police, fire, and other public-health services.

Mitra's transmissions on Halloween included "information" that was received by the Smartnet. Data that Mitra sent interfered with the way the computer allocated communications to the other 19 channels and stopped the flow of information among public-safety officers. This led to "damage" by causing a "no system" condition citywide, impairing the "availability of . . . a system, or information" and creating "a threat to public health or safety by knocking out police, fire, and emergency communications."

The Court of Appeals wrote that Mitra's theory is that all he did was "gum up a radio system." Mitra did not hack into a computer, as the Congress intended the statute to mean. Mitra argued that if what he did violates Section 1030, then "Every cell phone and cell tower

is a "computer" under this statute's definition; so is every iPod, every wireless base station in the corner coffee shop, and many another gadgets." Reading Section 1030 to cover all of these, and police radio too, Mitra asserted, would expand the statute's coverage beyond what Congress contemplated or intended. Indeed, in its briefs, and at oral argument, the government conceded that Mitra's prosecution was a novel application of the statute.

The Court of Appeals did not discuss in detail the ramifications of this holding for a computer chip based economy. However, the Court of Appeals did go into detail on the nature of the legislative process, and legislative intent. That is, Mitra argued that the Congress could not have intended when it enacted Section 1030 over twenty years ago that it would apply to communications systems that use computer chips. But this Court of Appeals opinion, authored by Judge Easterbrook, holds that courts should not be guided by legislative intent.

Legislatures do not have intent, wrote the Court of Appeals, only individual legislators do. And, their intent is not pertinent to courts. The Court of Appeals acknowledged that neither the Congress nor legislators intended the application of Section 1030 to Mitra's acts, but the absence of such intent on the part of Congress does not matter. The Court of Appeals wrote that legislatures "write general statutes rather than enacting a list of particular forbidden acts. And it is the statutes they enacted - not the thoughts they did or didn't have - that courts must apply."

The Court of Appeals noted that there are limitations on the scope of Section 1030. There must be intentional damage. Also, the damage must be at least \$5,000 or

bodily injury or danger to public safety. Finally, the computer must operate in interstate commerce. However, this third limitation hardly operates as a limitation. The Court of Appeals wrote that *any* use of radio frequency is interstate commerce, because radio spectrums are licensed by the Federal Communications Commission (FCC). It does not matter if the use of the spectrum is neither interstate nor commercial. By operation of law, it is interstate commerce.

The Court of Appeals noted that the spectrum used by Madison public safety entities is licensed by the FCC. The opinion is silent on what affect the use of an unlicensed spectrum would have on the interstate commerce analysis.

Mitra was sentenced before *United States v. Booker*, 125 S. Ct. 738 (2005), and did not formally argue in the District Court that the Sixth Amendment limits the judge's role in sentencing. Mitra argued in the Court of Appeals that it was unfair to impose a hard and fast rule that unless a defendant made an argument in the District Court that the Court of Appeals had already termed frivolous (that *Apprendi* applied to guidelines calculations), that review now would now be limited to a search for plain error. Indeed, the Seventh Circuit Court of Appeals, although it had invariably rejected as frivolous such *Apprendi* arguments, wrote that,

The approach developed in *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005), applies to this sentence, which falls within a properly calculated guideline range. Accordingly, although the judgment of conviction is affirmed, we remand to the district court under the terms of *Paladino* so that the district judge may inform us whether the additional discretion provided by